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Distributing Inc., Warner Bros. Home
10 Entertainment Inc., Warner Communications
11 Inc., TW UK Holdings Inc., Robert Lorenz,
Michele Weisler, and Randy Brown

12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**

14 GOLD GLOVE PRODUCTIONS,
15 LLC, a California Limited Liability
Company and RYAN A. BROOKS, an
16 individual,

17 Plaintiffs,

18 v.

19 DON HANDFIELD, an individual,
TRESSA DIFIGLIA HANDFIELD, an
20 individual, RANDY BROWN, an
individual, MICHELE WEISLER, an
21 individual, CHARLES FERRARO, an
individual, JAY COHEN, an individual,
22 ROBERT LORENZ, an individual,
UNITED TALENT AGENCY, INC., a
23 California corporation, THE GERSH
AGENCY, a California corporation,
24 WARNER BROS. PICTURES INC., a
Delaware corporation, MALPASO
25 PRODUCTIONS, LTD., a California
corporation, WARNER BROS.
26 DISTRIBUTING INC., a Delaware
corporation, WARNER BROS. HOME
27 ENTERTAINMENT INC., a Delaware
corporation, WARNER BROS.
28 DOMESTIC TELEVISION

Case No. CV13-07247-DSF (RZx)

**WARNER DEFENDANTS'
MOTION FOR SANCTIONS
PURSUANT TO FEDERAL RULE
OF CIVIL PROCEDURE 11**

DECLARATION OF ASHLEY
PEARSON AND [PROPOSED]
ORDER FILED HEREWITH

The Hon. Dale S. Fischer

Hearing Date: June 2, 2014
Hearing Time: 1:30 p.m.
Courtroom: 840

1 DISTRIBUTION, INC., a Delaware
2 corporation, TW UK HOLDINGS,
3 INC., a Delaware corporation, and
4 DOES 1-10, inclusive

5 Defendants.

1 TO DEFENDANTS AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that on June 2, 2014, at 1:30 p.m., or as soon
 3 thereafter as counsel may be heard by the above-entitled court, located in
 4 Courtroom 840 at 255 East Temple Street, Los Angeles, California 90012,
 5 Defendants Warner Bros. Studio Enterprises Inc., Warner Bros. Distributing Inc.,
 6 Warner Bros. Home Entertainment Inc., Warner Communications Inc., TW UK
 7 Holdings Inc., The Malpaso Company, Inc., Randy Brown, Michele Weisler, and
 8 Robert Lorenz (collectively, the “Warner Defendants”¹) will and hereby do move,
 9 pursuant to Rule 11 of the Federal Rules of Civil Procedure, for sanctions against
 10 The Law Offices of Gerard Fox, Inc. and the named counsel representing Plaintiffs
 11 in this case (collectively, “Plaintiffs’ Counsel”).

12 This motion is made following the 21-day notice period required by Rule
 13 11(c)(2), as well as numerous conferences of counsel conducted pursuant to Central
 14 District Local Rule 7-3 and the Court’s Standing Order, Docket No. 6 at 7. *See*,
 15 *e.g.*, Decl. of Ashley Pearson (“Pearson Decl.”) Exs. 9, 21. The Warner Defendants
 16 provided plaintiffs with an exact copy of this Motion on January 9, 2014 (save for
 17 this sentence and the filing date), in accordance with Rule 11, and plaintiffs stated
 18 they would oppose the motion and not withdraw their pleadings. *Id.*

19 This motion is based on the following grounds:

20 1. Plaintiffs’ Counsel filed an objectively frivolous copyright complaint in
 21 this case, laced with reckless, scandalous personal attacks against defendants,
 22 accusing them of crimes, fraud, and being imposters. *See* Docket Nos. 1, 28, 70.
 23 Any investigation into the facts underlying this lawsuit or review of the
 24 governing copyright, RICO, and California state law on which the complaint is

25
 26 ¹ Plaintiffs’ complaint erroneously names three of the nine Warner Defendants.
 27 It names Defendant Warner Bros. Studio Enterprises Inc. as “Warner Bros. Pictures
 28 Inc.”; Warner Communications Inc. as “Warner Bros. Domestic Television
 Distribution, Inc.”; and The Malpaso Company, Inc. as “Malpaso Productions,
 Ltd.” *See* Docket Nos. 1; 28; 45 at 2.

1 premised would reveal the case was wholly without basis. So, too, would have
2 contacting Defendants in advance of this filing, which Plaintiffs' Counsel chose
3 not to do, instead publicizing the incendiary lawsuit. *Id.* ¶ 3 & Exs. 2, 3 at 9.

4 2. Plaintiffs' Counsel then compounded the harm by heedlessly pursuing
5 this case and racking up needless fees and costs, despite being provided a virtual
6 mountain of evidence by the Warner Defendants and neutral third parties—all
7 showing that Defendant Randy Brown did *not* copy Plaintiffs' *Omaha* script, but
8 that Brown both completed and sold his *Trouble With The Curve* ("TWTC")
9 script to a third-party production company years before *Omaha* was conceived.
10 Plaintiffs' Counsel's response: This did not matter because their client came
11 from a family of means, their firm were being paid by the hour (not on
12 contingency), their firm had success suing movie studios, and Plaintiffs' Counsel
13 had hired a team of experts to support their claims. *Id.* Ex. 7.

14 3. The Warner Defendants gave Plaintiffs' Counsel numerous opportunities
15 to take a pause in this litigation to review the evidence and to dismiss this ill-
16 founded case. Instead of doing so, Plaintiffs' Counsel reflexively called each
17 delivery of case-dispositive evidence a "fraud" or "manufactured"—and not only
18 pressed forward with the case, but filed an objectively frivolous summary
19 judgment motion, attesting there were no disputed issues of fact. That motion
20 included a stack of objectively baseless expert reports; the sorts of reports that
21 are regularly rejected in copyright cases, and that, *far worse*, deliberately ignored
22 the extensive evidence the Warner Defendants adduced showing the independent
23 creation of *TWTC*. Plaintiffs' motion—which tellingly did not cite a single case
24 or legal authority granting the relief they sought on even remotely similar facts—
25 compelled the Warner Defendants to spend even more money defending the case.
26 Indeed, the most obvious tell that Plaintiffs' motion lacked merit was that it
27 included *no legal analysis* but simply invited the Court to review its experts'
28 reports. Docket Nos. 66 at 25; 108-09 (Defs.' opposition and cross motion).

4. The Warner Defendants warned Plaintiffs' Counsel from the outset of this case that, if Defendants prevailed, they would seek their reasonable fees and costs from Plaintiffs' Counsel pursuant to Rule 11, and from Plaintiffs under the Copyright Act. *E.g.*, Ex. 3 at 16-17. The Warner Defendants have sought to mitigate and reduce their fees and costs at every turn, but Plaintiffs' Counsel and Plaintiffs have recklessly pressed ahead, *e.g.*, scheduling needless depositions, conducting wasteful and duplicative "forensic" examinations, piling on needless filings, and demanding "proof" from Defendants the law does not remotely require. *E.g.*, Pearson Decl. Exs. 13, 14 at 241, 15, 17, 21 at 266-67, 26-27.

Defendants will move separately under the Copyright Act to obtain their fees and costs from Plaintiffs.² In this Rule 11 motion, the Warner Defendants seek an order holding Plaintiffs' Counsel jointly and severally liable for any fees and costs awarded the Warner Defendants against Plaintiffs.³ In their motion for fees and costs against Plaintiffs, the Warner Defendants will submit the detailed joint statement required by the Court's Standing Order, setting forth their exact legal expenses incurred, and, in advance of that filing, they will provide Plaintiffs' Counsel and Plaintiffs with all of the evidence of their reasonable fees and costs as is required by the Court's rules. *See* Docket No. 6 at 12-15.

This motion for sanctions is based on this Notice of Motion and accompanying Memorandum of Points and Authorities; the concurrently filed Declaration of Ashley Pearson; the concurrently filed Proposed Order; all other

² *See, e.g.*, 17 U.S.C. § 505; *Balsley v. LFP, Inc.*, 691 F.3d 747, 773 (6th Cir. 2012) ("The grant of fees and costs [under § 505] 'is the rule rather than the exception and they should be awarded routinely.'"); *Berry v. Deutsche Bank Trust Co. Ams.*, 632 F. Supp. 2d 300, 302 (S.D.N.Y. 2009); *Tillman v. New Line Cinema Corp.*, 2008 WL 5427744, at *4-5 (N.D. Ill. Dec. 31, 2008).

³ *See, e.g.*, FED. R. CIV. P. 11(c)(1); *Religious Tech. Ctr. v. Gerbode*, 1994 WL 228607, at *4-5 (C.D. Cal. May 2, 1994) (awarding sanctions jointly and severally against attorney and law firm).

1 briefing in this case; and such additional submissions and argument, including any
2 reply briefing, as may be presented at or before the hearing on this motion.

3 Dated: April 29, 2014

Respectfully submitted,

4 O'MELVENY & MYERS LLP

5 By: /s/ Matthew T. Kline

6 Matthew T. Kline
7 Lead Counsel for Warner Defendants

TABLE OF CONTENTS

		Page
1		
2		
3	I. INTRODUCTION.....	1
4	II. LEGAL BACKGROUND.....	2
5	III. RULE 11 SANCTIONS ARE WARRANTED.	4
6	A. Assertion of Baseless Claims and an Abject Failure to	
7	Investigate.	4
8	B. Refusal to Stand Down and Reckless Allegations of Fraud.....	7
9	C. Forcing Additional Needless Motion Practice and Further	
10	Work.....	11
11	V. CONCLUSION	14
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

TABLE OF AUTHORITIES

	Page
<u>CASES</u>	
<i>Aagard v. Palomar Builders, Inc.</i> , 344 F. Supp. 2d 1211 (E.D. Cal. 2004)	6
<i>Adriana Int'l Corp. v. Lewis & Co.</i> , 913 F.2d 1406 (9th Cir. 1990)	3, 4
<i>Arclightz & Films Pvt., Ltd. v. Video Palace, Inc.</i> , 2003 WL 22434153 (S.D.N.Y. Oct. 24, 2003)	3, 12
<i>Balsley v. LFP, Inc.</i> , 691 F.3d 747 (6th Cir. 2012)	3
<i>Berry v. Deutsche Bank Trust Co. Ams.</i> , 632 F. Supp. 2d 300 (S.D.N.Y. 2009)	3
<i>Burger-Moss v. Steinman</i> , 127 F.R.D. 452 (S.D.N.Y. 1989)	4, 10
<i>Bus. Guides, Inc. v. Chromatic Commc'ns Enters.</i> , 498 U.S. 533 (1991)	2
<i>Calloway & LeFlore v. Marvel Entm't Grp., Div. of Cadence Indus. Corp.</i> , 854 F.2d 1452 (2d Cir. 1988), <i>rev'd on other grounds</i> , 493 U.S. 120 (1989)	4, 5, 11
<i>Christian v. Mattel</i> , 286 F.3d 1118 (9th Cir. 2002)	5
<i>Dielsi v. Falk</i> , 916 F. Supp. 985 (C.D. Cal. 1996)	6
<i>Hays v. Sony Corp. of Am.</i> , 847 F.2d 412 (7th Cir. 1988)	4, 5
<i>Katzman v. Victoria's Secret Catalogue</i> , 167 F.R.D. 649 (S.D.N.Y. 1996), <i>aff'd</i> 113 F.3d 1229 (2d Cir. 1997)	3
<i>Kodadek v. MTV Networks, Inc.</i> , 152 F.3d 1209 (9th Cir. 1998)	6
<i>Tillman v. New Line Cinema Corp.</i> , 2008 WL 5427744 (N.D. Ill. Dec. 31, 2008)	3

1	<i>Religious Tech. Ctr. v. Gerbode,</i>	
2	2008 WL 5427744 (N.D. Ill. Dec. 31, 2008)	3
3	<i>Smith & Green Corp. v. Tr. of the Const. Inds. & Laborers Health &</i>	
4	<i>Welfare Trust,</i>	
	244 F. Supp. 2d 1098 (D. Nev. 2003)	3, 6
5	<i>Stewart v. Wachowski,</i>	
6	2005 WL 6184235 (C.D. Cal. June 14, 2005).....	6
7	<i>Zuk v. E. Penn. Psychiatric Inst. of the Med. College of Penn.,</i>	
	103 F.3d 294 (3d Cir. 1996)	3, 5

STATUTES

9	17 U.S.C. § 301(a).....	6
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OTHER AUTHORITIES

11	A. KOZINSKI, LAW AND POPULAR CULTURE: HOW I NARROWLY	
12	ESCAPED INSANITY, 48 UCLA L. REV. 1293 (2001).....	5

RULES

13	FED. R. CIV. P. 11.....	<i>passim</i>
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I. INTRODUCTION

Rule 11 sanctions are appropriate against Plaintiffs' Counsel because this case—accusing Defendants of copying the movie *TWTC* from *Omaha*—should never have been filed. The two works are not remotely similar under the well-established copyright case law, and had Plaintiffs ever asked the Warner Defendants whether defendant Randy Brown copied *TWTC* from *Omaha*, they would have provided Plaintiffs with extensive evidence that Brown worked on, completed, and sold *TWTC* to a third-party production company, The Bubble Factory, some *seven years before* Plaintiffs even conceived of *Omaha* in 2004.

Once the case was filed, it should have been dismissed as soon as the Warner Defendants sent Plaintiffs a dated 1998 draft of the *TWTC* script, and showed how that 1998 script contained every story element that Plaintiffs alleged defendants stole from *Omaha*.

And if there were any doubt—*any*—this case should have been dismissed by any reasonable lawyer when the Warner Defendants provided Plaintiffs with a stack of sworn declarations from third-party witnesses, with no financial interest in this case, attesting to how Brown developed, wrote, sold, revised, and marketed *TWTC* in the 1990s. These declarations were accompanied by dated hard copy and electronic evidence from various sources showing that *TWTC* was complete in the late 1990s and contained all of the story elements that Plaintiffs say were copied.

But Plaintiffs' Counsel has been anything but reasonable. They began by filing a 120-page complaint—which they then promoted—accusing Randy Brown (a humble father of two who worked much of his adult life to get *TWTC* produced) of being a *criminal*, an *impostor*, a *quitter*, and a *liar*. The press repeated these allegations, harming Mr. Brown personally, as Plaintiffs' lead counsel knows well can occur, as noted on the litigation strategy blog he authors. *See, e.g.*, Pearson Decl. ¶ 3 & Ex. 1 at 7. In the complaint, Plaintiffs' Counsel also accused Warner Bros., its affiliates, respected directors and producers, and several unaffiliated talent

1 agencies, agents, and writers of a massive *criminal* copyright conspiracy to steal
2 *Omaha* to make *TWTC*. Again, Plaintiffs' Counsel made these wild claims without
3 ever first contacting Defendants.

4 When the Warner Defendants contacted Plaintiffs' Counsel and provided
5 declarations from third-party, *percipient* witnesses—including a film professor who
6 worked with Brown on *TWTC* in the 1990s, a well-respected literary attorney who
7 negotiated his option agreement selling *TWTC* in 1998, and entertainment
8 executives who bought, marketed, and reviewed *TWTC*, starting in 1997—
9 Plaintiffs' Counsel told the press and this Court that these witnesses were *liars*
10 engaged in *fraud*. Plaintiffs' Counsel has also pursued this case heedlessly—
11 forcing defendants to move for summary judgment, to fend off needless discovery,
12 and to oppose Plaintiffs' manifestly frivolous motion for summary judgment.
13 Plaintiffs' Counsel has done so for one reason: By their own account, Plaintiffs
14 come from means, and Plaintiffs' Counsel is billing this case by the hour.

15 Plaintiffs' Counsel knows this case is frivolous. The two depositions they
16 have taken confirm this, as does every scrap of evidence in the case, and as does
17 clear Ninth Circuit law. Plaintiffs' Counsel defend their actions, however, and seek
18 to avoid sanctions by saying the experts they hired provide them air cover. But as
19 shown in great detail in the Warner Defendants' opposition to Plaintiffs' motion for
20 summary judgment and related filings, the experts' reports are objectively baseless
21 under established copyright law, and worse still, the reports ignore the extensive
22 evidence of prior creation that the Warner Defendants have provided Plaintiffs.

23 Rule 11 sanctions should rarely be invoked. But as courts have recognized in
24 similar copyright and RICO cases, they are fully appropriate and warranted in cases
25 like this one—which needlessly harass defendants and waste the Court's resources.

26 **II. LEGAL BACKGROUND**

27 Rule 11 is “aimed at curbing abuses of the judicial system.” *Bus. Guides, Inc.*
28 *v. Chromatic Commnc's Enters.*, 498 U.S. 533, 542 (1991). It imposes a “duty” on

1 attorneys to conduct “prefiling inquiry into both the facts and law.” FED. R. CIV. P.
2 11(b)(2) & Comment to 1983 Amendment. Rule 11 also mandates that counsel not
3 “multiply the proceedings ... if at any point it becomes apparent [they] will not be
4 able to prove any element essential to [their] claims.” *Arclightz & Films Pvt., Ltd. v.*
5 *Video Palace, Inc.*, 2003 WL 22434153, at *7 (S.D.N.Y. Oct. 24, 2003).

6 Rule 11 mandates sanctions where an attorney pursues factually or legally
7 frivolous claims, or presents filings to the Court for “any improper purpose, such as
8 to harass ... or needlessly increase the cost of litigation.” FED. R. CIV. P. 11(b)(1)-
9 (3), (c) & Comment to 1983 Amendment. A claim is “frivolous” under Rule 11 if
10 “no competent attorney would believe it was well-grounded in fact and warranted
11 by law.” *Adriana Int’l Corp. v. Lewis & Co.*, 913 F.2d 1406, 1415 (9th Cir. 1990).

12 Rule 11 sanctions are fairly often awarded in copyright and RICO cases,
13 given how clear copyright case law is on certain subjects and given the harm RICO
14 claims can cause defendants. *See, e.g., Zuk v. E. Penn. Psychiatric Inst. of the Med.*
15 *College of Penn.*, 103 F.3d 294, 300 (3d Cir. 1996) (Rule 11 sanctions against
16 attorney whose “weak grasp of copyright law ... caused him to pursue a course of
17 conduct which was not warranted by existing law and compelled the defendant to
18 expend time and money in needless litigation”); *Katzman v. Victoria’s Secret*
19 *Catalogue*, 167 F.R.D. 649, 660 (S.D.N.Y. 1996) *aff’d*, 113 F.3d 1229 (2d Cir.
20 1997) (sanctions are especially appropriate for bringing frivolous RICO claims,
21 given the “stigmatizing effect” on defendants). Sanctions are also appropriate
22 where, as here, Plaintiffs pursue state-law claims that are clearly preempted by
23 federal copyright law. *See, e.g., Smith & Green Corp. v. Tr. of the Const. Inds. &*
24 *Laborers Health & Welfare Trust*, 244 F. Supp. 2d 1098, 1108 (D. Nev. 2003).

25 Sanctions are most justified here, however, given Plaintiffs’ Counsel’s failure
26 ever to contact the Warner Defendants before suing them, and given the way that
27 Plaintiffs’ Counsel recklessly pressed ahead in this case, accused defendants,
28 witnesses, and counsel of “fraud,” and caused defendants to spend needless time

1 and money defending an objectively baseless case. *See, e.g., Hays v. Sony Corp. of*
2 *Am.*, 847 F.2d 412, 418 (7th Cir. 1988) (Rule 11 sanctions against plaintiff's
3 attorney who "did not so much as write Sony (before suing it)"); *Calloway &*
4 *LeFlore v. Marvel Entm't Grp., Div. of Cadence Indus. Corp.*, 854 F.2d 1452,
5 1455, 1472, 1483 (2d Cir. 1988), *rev'd on other grounds*, 493 U.S. 120 (U.S. 1989)
6 (sanctioning plaintiffs' counsel in copyright case who recklessly asserted that
7 defendant "forged" a key document); *Burger-Moss v. Steinman*, 127 F.R.D. 452,
8 453-54 (S.D.N.Y. 1989) (sanctioning plaintiff's counsel who needlessly forced
9 defendant to move for judgment on what was a baseless claim).

10 Plaintiffs' Counsel have violated all of these rules, repeatedly.

11 **III. RULE 11 SANCTIONS ARE WARRANTED**

12 **A. Assertion of Baseless Claims and an Abject Failure to Investigate.**

13 *1. Similarity.* As discussed in detail in the Warner Defendants' summary
14 judgment opposition and cross-motion for summary judgment on "similarity"
15 grounds, Docket Nos. 108-09, *TWTC* and *Omaha* are not remotely "similar" movies
16 under this Court's well-established copyright jurisprudence. They have different
17 plots, characters, settings, and dialogue, and only share the most high-level story
18 concepts—which are unprotectable under copyright law. *Id.* Indeed, Plaintiffs
19 cannot point to a *single* case under the Court's case law finding two movies that are
20 so dissimilar to be copies of one another. Docket Nos. 108 at 7-11. To the
21 contrary, the Ninth Circuit has consistently rejected copyright claims in cases
22 involving far more similarities—including movie titles, scenes, plot lines, and even
23 ahistorical story premises—*none* of which *TWTC* and *Omaha* share. *Id.* at 11-13.
24 While Plaintiffs' Counsel got three supposed "experts" to say the films are
25 "similar," such conclusory testimony untethered to the law is regularly rejected by
26 courts in copyright cases as unhelpful and improper. *Id.* at 13-16; Docket No. 110.
27 In short, no "competent attorney would believe" that a claim that *TWTC* was legally
28 similar to *Omaha* was "warranted by law." *Adriana*, 913 F.2d at 1415. Plaintiffs'

1 Counsel purport to be entertainment law experts, but even lawyers with a “weak
2 grasp of copyright law” would be properly sanctioned under Rule 11 for filing this
3 case. *Zuk*, 103 F.3d at 300.

4 2. *Prior Creation*. Plaintiffs’ Counsel also never bothered to contact Brown
5 or any of the Warner Defendants before accusing them of abject *crimes* in their
6 120-plus-page complaint. *Cf. Hays*, 847 F.2d at 418 (sanctioning counsel, in part,
7 for failing to perform such basic diligence). Had Plaintiffs’ Counsel done so, the
8 Warner Defendants would have provided them with the extensive evidence
9 showing that Brown created, completed, and sold *TWTC* to the Bubble Factory in
10 1997—when Plaintiff Ryan Brooks was still in high school, and seven years before
11 Brooks would allegedly conceive of *Omaha*. Docket No. 28 ¶¶ 46, 62.

12 This evidence of Brown’s work on *TWTC* in the 1990s is detailed in the
13 Warner Defendants’ summary judgment filings, Docket Nos. 98; 108 at 16-18;
14 109—and such proof of prior creation clearly bars Plaintiffs’ claims. *See Christian*
15 *v. Mattel, Inc.*, 286 F.3d 1118, 1128 (9th Cir. 2002) (“[a]s a matter of simple logic,
16 it is impossible to *copy* something that does not exist”); Docket No. 98 at 7-9.
17 Again, any competent lawyer who reviewed this evidence would advise his client to
18 move on with his life and *not* file or pursue such a baseless case. *Cf. A. Kozinski,*
19 *Law And Popular Culture: How I Narrowly Escaped Insanity*, 48 UCLA L. REV.
20 1293, 1301-02 (2001).⁴

21 3. *Frivolous State-Law and RICO Claims*. Even if there were a copyright
22 claim to assert here (and there is not), no competent lawyer would have asserted the
23

24 ⁴ Indeed, even before filing this lawsuit, Plaintiffs’ Counsel had evidence that
25 *TWTC* was written prior to *Omaha*. Plaintiffs concede in their complaint that on
26 September 6, 2012, one of Brooks’ friends gave him “an allegedly ‘older version’
27 of the *Trouble with the Curve* script.” Docket No. 28 ¶ 11. Plaintiffs’ complaint
28 asserts the script was “manufactured,” “counterfeit,” and “faked,” *id.* ¶¶ 11, 27,
107, but gives no explanation why Plaintiffs or their Counsel never asked the
Warner Defendants whether this were true, as the law counsels they plainly should
have done. *See Hays*, 847 F.2d at 418; *Calloway*, 854 F.2d at 1455, 1472, 1483.

1 claims Plaintiffs pursue under RICO and California state law. As examples, the
2 RICO claim is predicated on nothing more than copyright infringement, and not the
3 sort of criminal, “Canal Street” piracy scheme on which a RICO claim could
4 conceivably be based. *See Stewart v. Wachowski*, 2005 WL 6184235, at *5 (C.D.
5 Cal. June 14, 2005) (RICO claim based on basic copyright infringement barred).

6 Equally frivolous are Plaintiffs’ state-law claims. Each pivots on a claim that
7 *TWTC* infringes *Omaha*.⁵ In enacting the 1976 Copyright Act, Congress expressly
8 preempted such state law claims. 17 U.S.C. § 301(a) (“On and after January 1,
9 1978, all legal or equitable rights that are equivalent to any of the exclusive rights
10 within the general scope of copyright ... are governed exclusively by this title.”).
11 For decades, courts in this Circuit have repeatedly recognized the supremacy of
12 federal law in this area, holding that unfair competition, conversion, and tortious
13 interference claims based on copying claims are all preempted.⁶ Filing such plainly
14 preempted claims is sanctionable. *See Smith & Green*, 244 F. Supp. 2d at 1108.

15 Based on any of the three separate bases enumerated above, the Court is fully
16 empowered to sanction Plaintiffs’ Counsel for the complaint they filed on October
17 1, 2013. Their conduct since then only cements the appropriateness of this result.

18
19
20 ⁵ *See* Docket No. 28 ¶¶ 252 (Claim 5; tortious interference; “Defendants/Co-
21 Conspirators executed a plan to infringe upon Plaintiff Gold Glove Productions’
22 unique, copyrighted father-daughter baseball story”); 259 (Claim 7; conversion;
23 “[e]ach Defendant, as part of the conspiracy alleged herein, wrongfully converted
24 and disposed of Gold Glove Productions’ rights by misappropriating the screenplay
25 *Omaha*”); 279 (Claim 9; CAL. BUS. & PROF. CODE § 17200; “Defendants’/Co-
26 Conspirators’ conduct was fraudulent in that it attempted to deceive reasonable
27 consumers by stealing the potential award-winning story of *Omaha* and ...
28 camouflaging it as the resulting infringing work, [*TWTC*]”) (underlining added).

⁶ *See Kodadek v. MTV Networks, Inc.*, 152 F.3d 1209, 1212 (9th Cir. 1998)
(Copyright Act preempts copying claims asserted under § 17200); *Aagard v.*
Palomar Builders, Inc., 344 F. Supp. 2d 1211, 1219 (E.D. Cal. 2004) (same;
intentional interference with prospective economic advantage); *Dielsi v. Falk*, 916
F. Supp. 985, 992 (C.D. Cal. 1996) (same; conversion; state-law claim premised on
“allegation that Defendants have wrongfully used” Plaintiff’s script by copying it).

B. Refusal to Stand Down and Reckless Allegations of Fraud.

1. *Defendants' Efforts to Reason with Plaintiffs' Counsel.* Days after being served with Plaintiffs' complaint and retaining counsel, the Warner Defendants wrote to Plaintiffs' Counsel on October 10, 2013. Pearson Decl. Ex. 3. In a 10-page letter, accompanied by exhibits, the Warner Defendants detailed the many reasons this case was without merit. *See id.* They showed how *TWTC* and *Omaha* were not legally similar; how Plaintiffs' state-law claims were preempted and their RICO claims were baseless; and, most importantly, how Brown had written *TWTC* in the 1990s, sold it to The Bubble Factory, and how a 1998 version of the *TWTC* script contained all of the story elements Plaintiffs claimed were stolen. *Id.* at 9-18. Defendants enclosed a 1998 copy of the *TWTC* script that Brown's former lawyer kept in her law firm's files. *Id.* at 20-139. Defendants furnished a dated, executed copy of The Bubble Factory's 1997 option agreement to buy *TWTC* from Brown, as well as follow-on contracts and a copy of a check for the option rights. *Id.* at 141-210. And the Warner Defendants provided a detailed chart sourcing each element in the 2012 movie *TWTC* that Plaintiffs alleged was copied from *Omaha* to its specific and *actual* origin Brown's 1998 *TWTC* script. *Id.* at 11-14.

Plaintiffs' Counsel did not pause to review the evidence, and rather directed the Warner Defendants not to "waste any more time," saying their letter was "unfounded on many levels." *Id.* Exs. 4-5. Surprised, the Warner Defendants urged Plaintiffs' Counsel to dismiss the case, *without* prejudice to refile it, so as to take time to review the abundant evidence available of *TWTC*'s independent and prior creation. *Id.* Ex. 6 at 214-115. Again, Plaintiffs' Counsel refused. *Id.* at 214.

In light of these unconsidered responses, the Warner Defendants went to the expense of obtaining seven floppy disks from Brown that contained electronic copies of several drafts of his *TWTC* script. The Warner Defendants had the files analyzed by a leading computer forensic expert (Scott Cooper) because the disks could not be opened on standard, current-day computers, and because Plaintiffs'

1 Counsel wildly accused the Warner Defendants of “manufacturing” evidence. *Id.*
2 Cooper accessed 10 scripts on the disks, found they were created or last saved
3 between 1997 and 2003—all before *Omaha* was written—and opined that the
4 electronic evidence was both accurate and conclusive. Docket Nos. 104 ¶ 8; 104-1
5 at 3-4. The Warner Defendants notified Plaintiffs’ Counsel of these findings and
6 urged them again to “dismiss this ill-founded lawsuit.” *Id.* at 213.

7 Rather than request access to the disks, Plaintiffs’ Counsel responded *eight*
8 *minutes* later, calling the evidence a “fraud,” accusing Cooper of bias, and stating:
9 “We have a very strong case and are looking forward to trying it.” *Id.*

10 Plaintiffs’ Counsel wrote again a day later, purporting to respond to the
11 Warner Defendants’ challenges to the legal and factual underpinnings of Plaintiffs’
12 case. *Id.* Ex. 7. The letter cited no case law, included no evidence, and rather was a
13 speech about the litigation acumen of Plaintiffs’ Counsel, their clients’ resources,
14 and the Warner Defendants’ dishonesty. Plaintiffs’ Counsel touted their extensive
15 experience suing movie studios. *Id.* at 219. They stated they were working on the
16 case for an hourly fee. And they bragged their client “comes from a well known
17 and highly respected family from Houston.” *Id.* at 217-18. They proclaimed that
18 Brown “did not write the [*TWTC*] script given to [Plaintiffs on October 10], and
19 certainly not at the time suggested.” *Id.* at 218. And they touted experts and
20 investigators—none identified—who vouched for their claims. *Id.* at 218-19

21 Plaintiffs’ Counsel refused to drop any claims, *id.* at 219, and days later,
22 amended their complaint to remove pictures of Plaintiffs and a large quote from *The*
23 *Great Gatsby*. They left their legal claims intact along with irrelevant personal
24 attacks, like calling Brown an “imposter.” Docket No. 28 ¶ 140. The press has
25 reported and noted these personal “insults” directed at Brown. Pearson Decl. ¶ 3.

26 Over the next few weeks, and in a final effort to avoid costly motion practice,
27 the Warner Defendants gathered sworn declarations and more evidence showing
28 that *TWTC* was created in the 1990s. On November 8, the Warner Defendants sent

1 the evidence, totaling over 2,700 pages, to Plaintiffs' Counsel. Pearson Decl. Ex. 9.
2 It included, *e.g.*:

- 3 • Sworn declarations from Brown and four disinterested eye-witnesses who
4 worked with Brown in the 1990s to draft, revise, sell, and promote *TWTC*.
5 Docket Nos. 99-103.
- 6 • Multiple, dated, fully authenticated drafts of the script—which came from
7 The Bubble Factory's files, Brown's files, and his former lawyer's files.
8 Docket No. 101-1 at 15-123, 130-241, 250-369; 103-1 at 70-189.
- 9 • A "Coverage Report" analyzing a September 1997 draft of *TWTC*, dated
10 September 14, 1997, and bearing a fax legend showing it was faxed that
11 very same day. Docket No. 101-1 at 124-29.
- 12 • Numerous submission letters from 1997 to 2001 sending the *TWTC* script
13 to studios, managers, and agents. *Id.* at 374-381.
- 14 • And Cooper's expert report and findings. Docket Nos. 104; 104-1.

15 Citing the applicable case law, the Warner Defendants explained that this
16 evidence of prior creation was more than sufficient to warrant summary judgment.
17 Pearson Decl. Ex. 9. And as the Warner Defendants had done from the outset of
18 the case, they warned that, if Plaintiffs pressed ahead with this case, the Warner
19 Defendants would seek their fees and costs against Plaintiffs and Plaintiffs'
20 Counsel, including in this Rule 11 motion. *Id.* at 227; *see* Exs. 3 at 16-17; 6 at 213.

21 Plaintiffs' Counsel's response: "Your cleints' [sic] defense is contrived." *Id.*
22 Ex. 11 at 230. The Warner Defendants and their co-defendants pressed to meet
23 with Plaintiffs' Counsel on these issues and all of the defendants' initial motions,
24 but Plaintiffs' Counsel delayed and cancelled meetings, *id.* Ex. 11 at 230-31, then
25 refused to meet at all, *id.* Ex. 12 at 232-33, 14 at 238, and called the Warner
26 Defendants' evidence a "fraud," "false," "manufactured," "fabricated," and
27 "forged." *Id.* at 238-40; *id.* Exs. 11 at 230, 12 at 233-34, 18 at 251-52.

1 Plaintiffs' Counsel even went so far as to claim that the Warner Defendants'
2 witnesses had perjured themselves and provided "false" documents. *Id.* Ex. 14 at
3 240. Two of these witnesses (Neil Landau and Gerard Boccaccio) are respected
4 film professors at UCLA and NYU—one of whom (Landau) wrote a published
5 article well *before* Plaintiffs filed their case discussing the work he did with Brown
6 in the 1990s on the *TWTC* script. Docket No. 100-1 at 235-38. Two of the other
7 witnesses (Bill Sheinberg and Marcy Morris) are active members of the California
8 State Bar. Docket No. 103 ¶ 2. All of these third-party witnesses attested to having
9 no personal or financial interest in *TWTC*. Yet, Plaintiffs' Counsel blithely called
10 them liars, biased, and frauds.

11 Plaintiffs' Counsel's intransigence compelled the Warner Defendants to
12 move for summary judgment, which they did on December 4, 2013. Docket No.
13 98. In correspondence, Plaintiffs' Counsel called the Warner Defendants' summary
14 judgment filings "infected and baseless"—although they still provided no contrary
15 legal authority—and again accused the Warner Defendants of submitting
16 "fabricated evidence" to the Court. Pearson Decl. Ex. 28 at 289.

17 2. *The Propriety of Sanctions.* The failure to consider contrary evidence and
18 insistence on pursuing a claim with no factual basis is sanctionable. *See supra* at 2-
19 4. As an example, in *Burger-Moss*, the court awarded sanctions against plaintiff's
20 counsel in a copyright infringement case. Counsel put defendants to the "expense
21 of preparing [a] motion for summary judgment" when he "recognized that plaintiffs
22 were unable to prove access, an essential element of their claim." 127 F.R.D. at
23 453-54. Here, too, the Warner Defendants were forced to bear the unwarranted
24 expenses of moving for summary judgment, hiring forensic experts, and having to
25 secure numerous third-party declarations—all when there was clear documentary
26 evidence, from numerous sources, that *TWTC* was created years before *Omaha*.

27 The outrageous "fraud" allegations that Plaintiffs' Counsel glibly toss about
28 are independent bases for awarding sanctions. The claims have been made in

1 conferences with counsel, statements Plaintiffs' Counsel gave to the media, and
2 various court pleadings. *Supra* at 7-9 & n.4; Docket No. 66 at 5, 7, 23, 25. In
3 *Calloway*, a similar movie-script infringement case, plaintiff claimed defendant was
4 not authorized to make use of his script, and in response, defendant produced a
5 signed option agreement permitting the use. Plaintiff's counsel then added a claim
6 that defendant had "forged" the signature on the option agreement. 854 F.2d at
7 1455. After defendant defeated this forgery claim, the district court sanctioned
8 plaintiff's counsel for "his indifference to the existence of a factual basis" for the
9 forgery allegation, and the Second Circuit affirmed this award. *Id.* at 1472, 1483.

10 The conduct of Plaintiffs' Counsel here has been far, far worse.

11 **C. Forcing Additional Needless Motion Practice and Further Work.**

12 1. In an effort to stave off judgment on the Warner Defendants' affirmative
13 motion for summary judgment, Plaintiffs threatened to file a motion for summary
14 judgment of their own based on the expert reports they *never* disclosed. Pearson
15 Decl. Ex. 14. The Warner Defendants asked Plaintiffs' Counsel to produce the
16 reports or to cite to *any* case granting Plaintiff judgment in such a case—where the
17 issue of prior creation was so obviously disputed by defendants. *Id.* Ex. 16.
18 Plaintiffs' Counsel refused to do either. *Id.* Ex. 18 at 251-52.

19 Instead, they moved for summary judgment on the ground that *TWTC* and
20 *Omaha* were strikingly similar works. Docket No. 66. The motion, as shown in the
21 Warner Defendants' opposition to it, Docket No. 108, is frivolous—not to mention
22 a massive waste of the Court's and the parties' time. To begin, it improperly rests,
23 by Plaintiffs' own count on 98 alleged material facts. Docket No. 106-1. It barely
24 mentions the law (and then misstates it), and completely elides the threshold prior-
25 creation issue that bars their claims. Docket No. 66 at 23-25. And, most
26 fundamentally, it defies this Court's well-established jurisprudence on what sorts of
27 "similarities" are legally cognizable. Docket No. 108 at 11-13. Instead, it rests
28

1 exclusively on a six-inch stack of expert reports—but of the sort courts repeatedly
2 exclude in copyright cases. *Id.* at 16-24; Docket No. 110.

3 Burdening the Court and the Warner Defendants with this affirmative
4 summary judgment motion is the quintessence of needlessly “multiply[ing] the
5 proceedings,” *Arclightz*, 2003 WL 22434153, at *7, and “increas[ing] the cost of
6 litigation.” FED. R. CIV. P. 11(b)(1)-(3), (c). These wasteful filings are another
7 independent basis justifying the imposition of sanctions on Plaintiffs’ Counsel.

8 2. So, too, is Plaintiffs’ Counsel’s continued refusal to accept the reality of
9 still further evidence emerging in discovery. As just three examples:

- 10 • In his deposition, non-Warner Defendant Jay Cohen confirmed that he
11 read *TWTC* in 1998; tried to produce it for Punch Productions and Cosmic
12 Entertainment in the late 1990s and early 2000s; and the description of the
13 script in the 1997 “Coverage Report” matched the *TWTC* script he read in
14 the 1990s. Docket No. 112-5 at 257:21-24, 258:6-17, 260:5-262:15.
15 Plaintiffs’ Counsel refuses to dismiss Cohen or any defendant from the
16 case, and instead challenged the authenticity of the 1997 Coverage
17 Report. *Id.* at 261:2-5.
- 18 • To address this supposed challenge, the Warner Defendants obtained a
19 sworn declaration from the author of the 1997 Coverage Report, a former
20 freelance coverage writer named Carrie Gadsby. *Id.* Ex. 20. Plaintiffs’
21 Counsel has ignored this evidence as well. *Id.* Exs. 21 at 267, 20.
- 22 • The Warner Defendants also obtained other *TWTC* documents from the
23 1990s—including a hard-copy *TWTC* script dated “3/98”; two notebooks
24 of hand-written notes (some dated) concerning Brown’s work on *TWTC*;
25 and an “11/14/97” fax with extensive notes the on *TWTC* script from
26 Brown’s former manager. Plaintiffs’ Counsel again claimed fraud:
27 “Funny how AFTER our experts noted there were no notes, a set appears,
28 again, weeks later.” *Id.* Ex. 21 at 266. Even at the time of drafting this

1 motion, Plaintiffs continue to claim that the Warner Defendants' evidence
2 of prior creation is "fabricated," and insist on more, duplicative, costly,
3 and baseless forensic tests of plainly authentic evidence—evidence
4 verified by percipient testimony, third-party law firm files, third-party
5 production company files, and all other sorts of confirming evidence. *Id.*
6 Ex. 24, 26 28; Docket Nos. 99-104.

7 The desire of Plaintiffs' Counsel to bill this case to the end shows no sign of
8 abating. They have taken harassing depositions of defendants, like that of Randy
9 Brown, at which they spent considerable, needless time asking about his music
10 career and having him list his favorite baseball players. *E.g., id.* Ex. 25 at 275-77.
11 Worse still—and ignoring both the dictates of copyright law and freedoms of
12 fictional, creative choice—they spent much of the deposition debating Brown about
13 the story logic of creative *fictional* choices like:

- 14 • having a character drive a vintage car when parts of the movie required
15 him to drive through the hills of North Carolina, *id.* at 283-84;
- 16 • having a character drink coffee when he had glaucoma, *id.* at 285;
- 17 • having a lawyer character interview for a law-firm job in the spring, when
18 the hiring of big-firm associates is normally done in the fall, *id.* at 279-80;
- 19 • and having a scout character in the movie cuss and use the Lord's name in
20 vain, when one scouts who Brown interviewed for a few minutes on a
21 technical baseball question is allegedly devoutly religious, *id.* at 281-82.

22 Plaintiffs' Counsel threatened to depose Brown again (beyond the limits set
23 by the Federal Rules) and to take more depositions of parties and witnesses with no
24 connection to *TWTC*'s original creation, including Michele Weisler, who Plaintiffs
25 acknowledge had no involvement in *TWTC* until 2011. *Id.* Ex. 28 at 289. When
26 the Warner Defendants' counsel questioned the need to depose Weisler at this stage
27 in the litigation—when Plaintiffs' Counsel could point to *no acts* of actionable
28 copying to which she was possibly privy—Plaintiffs' Counsel accused the Warner

1 Defendants' counsel of "calling the day night" and threatened, "[s]ooner or later,
2 you'll see it's not." *Id.*

3 Plaintiffs' Counsel have also demanded further, costly, pointless, and
4 duplicative forensic examinations, including *eight* days of ink-dating testing by two
5 separate experts—and only on a fraction of the many sources of evidence showing
6 the independent and prior creation of *TWTC*. *Id.* Exs. 24, 26, 28.

7 They also they threaten to file new claims, *id.* Exs. 14 at 241, 28 at 29, and
8 have undertaken still further, recent efforts to publicize this lawsuit, *e.g.*, Pearson
9 Decl. ¶ 3, as well as and the damaging, false allegations it contains (particularly
10 about Mr. Brown) on Plaintiffs' Counsel's website. *See, e.g., id.* Exs. 2, 8, 19.
11 Indeed, the vitriolic insults that Plaintiffs' Counsel have directed at Brown have
12 been reported by the press as notably unusual. *See, e.g.*, Pearson Decl. ¶ 3.

13 This lawsuit—and these tactics—can and should be brought to an end. And
14 Plaintiffs' Counsel (and others who may wish to follow in their footsteps) should be
15 sent a clear message: Wasteful litigation of this sort is neither sport, nor is it a
16 costless exercise. Nor are endless missives accusing respected defendants, third
17 parties, and counsel of crimes and fraud—and commanding them to do things like
18 "read English," *id.* Exs. 28 at 289; Docket Nos. 28 ¶¶ 156-93, 265-70; 66 at 5-7, 12.

19 **IV. CONCLUSION**

20 The Warner Defendants' Rule 11 motion should be granted, and Plaintiffs'
21 Counsel should be sanctioned. Plaintiffs' Counsel, along with Plaintiffs, should be
22 held jointly and severally liable for the Warner Defendants' reasonable fees and
23 costs defending this case.

24 Dated: April 29, 2014

Respectfully submitted,
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